

EXHIBIT 1

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION.,

Civil Action No. 19-C-9000

MASS LITIGATION PANEL

**Alan D. Moats - Lead Presiding Judge
Derek C. Swope - Presiding Judge
Joanna I. Tabit, Lead Resolution Judge
Jay M. Hoke, Resolution Judge
Debra Scudiere, Resolution Judge**

HEARING

BEFORE: The Honorable Alan D. Moats, Lead Presiding Judge, the Honorable Derek C. Swope, Presiding Judge, the Honorable Joanna I. Tabit, Lead Resolution Judge, the Honorable Jay M. Hoke, Resolution Judge, and the Honorable Debra Scudiere, Resolution Judge, in the Kanawha County Courthouse, Ceremonial Courtroom, Charleston, Kanawha County, West Virginia, at 10:04 a.m., on the 6th day of December, 2019.

APPEARANCES: CLAYTON J. FITZSIMMONS, Attorney at Law
Fitzsimmons Law Firm PLLC
1600 Warwood Avenue
Wheeling, West Virginia 26003

and

Donna Miller-Mairs, Certified Court Reporter
7724 Sissonville Drive, Sissonville, West Virginia 25320
304-988-9581

APPEARANCES: (Continued)

HUNTER SHKOLNIK, Attorney at Law
JOSEPH L. CIACCIO, Attorney at Law
Napoli Shkolnik, LLP
360 Lexington Avenue, Eleventh Floor
New York, New York 10118

and

LISA F. FORD, Attorney at Law
217 East Main Street
Clarksburg, West Virginia 26301
Counsel for Plaintiffs

ANNE MCGINNIS KEARSE, Attorney at Law
112 Capitol Street, Suite 200
Charleston, West Virginia 25301
Counsel for Plaintiffs Clarksburg, Richwood, City of Nitro,
South Charleston, WJ Springs, Bell

STEPHEN B. FARMER, Attorney at Law
Farmer, Cline & Campbell, PLLC
746 Myrtle Road
Post Office Box 3842
Charleston, West Virginia 25338

and

JOHN W. “DON” BARRETT, Attorney at Law
Barrett Law Group, P.A.
404 Court Square North
Lexington, Mississippi 39095

and

LETITIA N. CHAFIN, Attorney at Law
The Chafin Law Firm
Post Office Box 1799
Williamson, West Virginia 25661

and

APPEARANCES: (Continued)

MARK TROY, Attorney at Law

Troy Law Firm
222 Capitol Street, Suite 200 A
Charleston, West Virginia 25301
Counsel for Plaintiffs Camden-Clark Memorial Hospital Corporation, The Charles Town General Hospital, City Hospital, Inc., Grant Memorial Hospital, Potomac Valley Hospital of W.Va., Inc., Reynolds Memorial Hospital, Inc., St. Joseph's Hospital of Buckhannon, Inc., West Virginia United Health System and Williamson Memorial Hospital, LLC

JAMES D. YOUNG, Attorney at Law

Morgan & Morgan Complex Litigation Group
76 South Laura Street, Suite 1100
Jacksonville, Florida 32202
Counsel for Plaintiffs, The County Commission of Mason County, et al and Mayor Peggy Knotts Barney on behalf of City of Grafton and Mayor Philip Bowers on Behalf of City of Philippi

ROBERT L. WHITE, Attorney at Law

5605 Starling Drive
Charleston, West Virginia 25306
Counsel for Mid-Ohio Valley 13 Plaintiffs

ERIC J. HOLMES, Attorney at Law

Law Offices of Harris & Holmes, PLLC
115 North Church Street
Ripley, West Virginia 25271
Counsel for Plaintiffs 19-C-96 through 19-C-108

VAUGHN T. SIZEMORE, Deputy Attorney General

Consumer Protection Division
812 Quarrier Street, First Floor
Charleston, West Virginia 25301
Counsel for State of West Virginia ex Rel Patrick Morrissey, Attorney General

WILLIAM R. SLICER, Attorney at Law

Shuman, McCuskey & Slicer, PLLC
1411 Virginia Street East, Suite 200
Post Office Box 3953
Charleston, West Virginia 25339

and

JOHN A. McCAULEY, Attorney at Law

2 Hopkins Plaza
Baltimore, Maryland 21201
Counsel for Abbott

APPEARANCES: (Continued)

ANA M. FRANCISCO, Attorney at Law

Foley & Lardner LLP
111 Huntington Avenue, Suite 2500
Boston, Massachusetts 02199-7610
Counsel for Anda, Inc.

KEITH A. JONES, Attorney at Law

STEVEN LUXTON, Attorney at Law

Jones Law Group, PLLC
Post Office Box 13395
Charleston, West Virginia 25360
Counsel for Actavis, LLC, Actavis Pharma, Inc., Watson Pharma, Inc., Watson Laboratories, Inc., Teva Pharmaceuticals USA, Inc., Cephalon, Inc, Teva Pharmaceuticals Industries Ltd., Inc. and Anda, Inc.

PATRICIA M. BELLO, Attorney at Law

Lewis Brisbois Bisgaard & Smith LLP
222 Capitol Street, Fifth Floor
Charleston, West Virginia 25301

and

DONNA WELCH, Attorney at Law

Kirkland & Ellis LLP
300 North LaSalle
Chicago, Illinois 60654
Counsel for Defendants Allergan Finance, LLC f/k/a/ Allergan, Inc. f/k/a Watson Pharmaceuticals

CHRISTOPHER D. PENCE, Attorney at Law

Hardy Pence PLLC
10 Hale Street, Fourth Floor
Charleston, West Virginia 25301

and

SARAH BENOIT, Attorney at Law

Ulmer & Berne LLP
65 East State Street, Suite 1100
Columbus, Ohio 43215-4213
Counsel for Amneal Pharmaceuticals LLC

WILLIAM A. HAHN, Attorney at Law

Barnes & Thornburg, LLP
11 South Meridian Street
Indianapolis, Indiana 42604
Counsel for Defendant AmerisourceBergen Drug Corporation in action by Ohio County Commission and H.D. Smith LLC f/k/a H.D. Smith Wholesale Drug Co.

APPEARANCES: (Continued)

ALVIN L. EMCH, Attorney at Law

Jackson Kelly PLLC

500 Lee Street, Suite 1600

Charleston, West Virginia 25322

Counsel for Defendant AmerisourceBergen Drug Corporation in
actions by Brooke, Hancock, Harrison, Lewis, Marshall, Tyler
and Wetzel County Commission

STEVEN R. RUBY, Attorney at Law

Bailey & Glasser, LLP

200 Capitol Street

Charleston, West Virginia 25301

Counsel for Defendant Cardinal Health, Inc.

CARTE P. GOODWIN, Attorney at Law

ALEX J. ZURBUCH, Attorney at Law

Frost Brown Todd LLC

500 Virginia Street East, Suite 1100

Charleston, West Virginia 25301

and

TODD A. MOUNT, Attorney at Law

Shaffer & Shaffer

Post Office Box 38

Madison, West Virginia 25130

Counsel for Defendant CVS Indiana, L.L.C.

ERIK W. LEGG, Attorney at Law

Farrell, White & Legg PLLC

The Farrell Building

914 Fifth Avenue

Post Office Box 6457

Huntington, West Virginia 25772

and

DAVID HIBEY, Attorney at Law

Arnold & Porter Kaye Scholer LLP

601 Massachusetts Avenue NW

Washington, DC 20001-3743

Counsel for Endo Health Solutions Inc. And Endo
Pharmaceuticals, Inc.

JON "J. H." MAHANEY, Attorney at Law

Dinsmore

611 Third Avenue

Huntington, West Virginia 25701

Counsel for Fruth Pharmacy

APPEARANCES: (Continued)

RHONDA L. HARVEY, Attorney at Law
FATAL A. SHEER, Attorney at Law
Bowles Rice LLP
600 Quarrier Street
Charleston, West Virginia 25301
Counsel for Kroger Limited Partnership II

JOHN J. MEADOWS, Attorney at Law
RUSSELL D. JESSE, Attorney at Law
Steptoe & Johnson
707 Virginia Street, East
Charleston, West Virginia 25301

and

JAMISON H. COOPER, Attorney at Law
Cooper Law Offices
240 W Main Street
Bridgeport, West Virginia 26330-1749
Counsel for McKesson Corp.

STEPHEN D. ANNAND, Attorney at Law
KEITH J. GEORGE, Attorney at Law
Robinson & McElwee, PLLC
700 Virginia Street, Suite 400
Charleston, West Virginia 25301
Counsel for Defendant Mallinkrodt and SpecGX LLC

MICHAEL B. HISSAM, Attorney at Law
Hissam Forman Donovan Ritchie PLLC
707 Virginia Street, East, Suite 260
Charleston, West Virginia 25301

and

REBECCA C. MANDEL, Attorney at Law
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, D.C. 20004
Counsel for Defendant Mylan Pharmaceuticals

LISA FURBEE FORD, Attorney at Law
Covington & Burling LLP
One City Center
850 Tenth Street, NW
Washington, DC 20001-4956

and

APPEARANCES: (Continued)

MARC E. WILLIAMS, Attorney at Law
MATTIE HUDSON, Attorney at Law
Nelson, Mullins, Riley & Scarborough, LLP
949 Third Avenue, Suite 200
Huntington, West Virginia 25701

and

MATTIE F. HUTTON, Attorney at Law
1625 Eye Street NorthWest
Washington, DC 20006
Counsel for Defendants Ortho-McNeil-Janssen
Pharmaceuticals, Inc. n/k/a Janssen Pharmaceuticals, Inc.,
Janssen Pharmaceutica, Inc. n/k/a Jannssen
Pharmaceuticals, Inc., Johnson & Johnson

JON B. ORNDORFF, Attorney at Law
KELLY CALDER MOWEN, Attorney at Law
99 Cracker Barrel Drive, Suite 100
Barboursville, West Virginia 25504
Counsel for Noramaco, Inc.

WEBSTER J. ARCENEUX, III, Attorney at Law
Lewis Glasser, PLLC
300 Summers Street
Charleston, West Virginia 25326
Counsel for Rite Aid of Maryland, Inc. and Rite Aid of West
Virginia, Inc.

SARAH A. WALLING, Attorney at Law
Jenkins Fenstermaker, PLLC
Post Office Box 2688
Huntington, West Virginia 25726
Counsel for Richard Sackler, M.D.

NEVA G. LUSK, Attorney at Law
Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard, East
Charleston, West Virginia 25301

and

CHRISTOPHER J. LOVRIEN, Attorney at Law
Jones Day
555 South Flower Street, Fiftieth Floor
Los Angeles, California 90071-2300
Counsel for Wal-Mart Stores East, LP

APPEARANCES: (Continued)

JUSTIN TAYLOR, Attorney at Law
Bailey & Wyant PLLC
500 Virginia Street, East, Suite 600
Charleston, West Virginia 25337
Counsel for West Virginia Board of Pharmacy

RITA MASSIE BISER, Attorney at Law
Moore & Biser, PLLC
317 Fifth Avenue
South Charleston, West Virginia 25303
Counsel for Henry Schein, Inc.

1 P R O C E E D I N G S

2 JUDGE MOATS: Good morning. It is good to
3 see everyone in such a great mood. It is Friday. We
4 have bar from West Virginia and out of state here.

5 I appreciate everybody's hard work that you
6 have done back since September.

7 I know you-all are waiting with bated breath
8 to see what we are going to do today. It depends on
9 how things go.

10 First of all, I want to reintroduce our Mass
11 Litigation Panel.

12 To my left is Judge Jay Hoke. He is from the
13 Lincoln and Boone County Circuit, and he is going to
14 be on the resolution part of the panel.

15 Next to him is our newest member of our Mass
16 Litigation Panel, Judge Debra Scudiere. Judge
17 Scudiere is in Monongalia County, and she took the
18 bench back in --

19 JUDGE SCUDIERE: April Fool's Day.

20 JUDGE MOATS: -- April Fool's Day, she says.
21 She said it. I didn't.

22 Before she took the bench, she was a long
23 time practicing attorney and recognized as one of the
24 foremost mediators in our state.

1 She has been active in every branch of the
2 legal profession and previous State Bar president, and
3 so she is a valuable addition.

4 I assigned her to the resolution side so we
5 can have her mediation skills.

6 Of course, I am Judge Moats. I am the
7 chairman of our mass litigation panel, and I am the
8 Lead Presiding Judge in this case.

9 To my right is Judge Derek Swope from Mercer
10 county, and he is on the trial side, and he has been
11 here a long time.

12 He and I are very closely aligned as far as
13 talking all the time and working closely together in
14 this litigation.

15 To my far right is Judge Joanna Tabit from
16 here in Kanawha County. Judge Tabit is the Lead
17 Presiding Resolution Judge in the case.

18 She has had long time experience in mediating
19 prior to becoming a judge and teaches mediation
20 courses.

21 So ordinarily, I told you before, when we do
22 these cases, normally we have an initial status with
23 all five or six or however many of the judges that we
24 have assigned to the case that are going to be

1 involved, and then after that first hearing we
2 normally don't get back together as a whole panel with
3 the two sides.

4 Now this time it is going to be different.
5 Until we actually begin the resolution phase, we are
6 going to continue to meet together because we believe
7 it is critically important in a case of this magnitude
8 and complexity that the resolution judges have full
9 understanding of what is happening, what has happened
10 to give them the extra tools and insight in this as
11 they go forward.

12 So that is why we are continuing to do this
13 in this manner.

14 Then once they start attempting to resolve
15 the case, then we will no longer be meeting and
16 working together.

17 Now as far as what we are going to do here
18 today, a few days ago I signed an order to extend some
19 deadlines pertaining to motions to dismiss.

20 I set some deadlines for the defendants for
21 the day after Christmas, and now yesterday some of the
22 defendants filed motions asking for an extension, and
23 they were quite kind in the way they did it.

24 They talked about the necessity of all the

1 work for today's hearing and getting ready instead of
2 saying, "Listen, Scrooge, what is wrong with you."

3 I just want you to be honest with me. So I
4 do not want to be called Judge Scrooge. Your motions
5 are granted, and you may have until January -- I think
6 you asked for the 9th, and that is fine.

7 After thinking about it, I was going to do it
8 anyway. I already had it on my schedule to do. I
9 didn't pay much attention, but I went back and looked
10 at it and I saw that I had given you until the 26th.

11 I didn't know if the attorneys here would do
12 it, but I figured some associate would be working here
13 on Christmas Eve and Christmas night and New Year's
14 Eve or whatever, and I didn't want that.

15 So we will enter those orders to extend that
16 time period and Merry Christmas to one and all.

17 MR. MEADOWS: Thank you, Your Honor.

18 JUDGE MOATS: You are welcome.

19 Now in keeping with the holiday season, I
20 hope all of you had a wonderful Thanksgiving. I hope
21 that you didn't have to spend Thanksgiving evening and
22 Thanksgiving and the day after working on this.

23 I did. Judge Swope did. Ms. Fields did, but
24 it didn't stop me from eating Thanksgiving dinner. So

1 don't feel sorry for any of us.

2 When I was eating Thanksgiving dinner, I
3 really enjoyed it. We always have big gatherings,
4 family gatherings, and I love Thanksgiving because it
5 seems to be a lot easier and more family and friends
6 oriented and I eat way too much.

7 So as I was doing that, I recalled back to
8 when I still had my mother growing up. My mother
9 would say, "If you put it on your plate, eat it, and
10 if you don't want it, don't put it on your plate."

11 My grandmother used to tell me and I am sure
12 some of yours did, too, "Your eyes are bigger than
13 your belly."

14 When I was a little kid, I didn't know what
15 she meant by that. I could not relate to that. I
16 soon learned.

17 Now what does that have to do with today?
18 Rule 19. We have read all of your responses, motions,
19 and I recalled back to my mother and my grandmother in
20 eating too much.

21 Looking at Rule 19, I see that there are
22 maybe 251 additional plaintiffs to bring in if we go
23 forward in that manner.

24 This case as I told you at the first hearing

1 is without question the most complex, complicated, and
2 trying matter we have ever dealt with.

3 Judge Polster says the same thing in federal
4 court, and I am sure judges in other states say the
5 same thing.

6 Judge Swope and I talk most every day early
7 in the morning, and we decided we were served an
8 elephant. I said, "How do you eat an elephant?" His
9 answer, "One bite at a time."

10 Well, we decided we are willing and we told
11 you we would eat the elephant that was served us, but
12 we decided we are not going to order a second helping.

13 As a result our rule to show cause in our
14 order to bring in all these other parties is
15 rescinded, and so that is the end of that.

16 We will eat it with what we have in front of
17 us. We will deal with anymore that are filed -- and I
18 don't know if you are aware there were eight more
19 cases filed in the past couple of weeks all dealing
20 with municipalities, and those are in Marshall County.

21 I am sure in good order there will be more
22 and we will deal with those, but we will not be
23 bringing anybody in under Rule 19.

24 So the motion is granted and our order will

1 be rescinded.

2 Now along those lines, however, I told you
3 the reason we were looking at that was to try to have
4 a full and complete resolution in this state to all
5 these matters.

6 We have cases pending in federal court. Some
7 of you-all are in both state court and federal court.

8 We have the huge issue of the federal class
9 settlement negotiating class where all of the towns
10 and counties across this country had until November 22
11 to decide to opt out.

12 We talked about the novelty of that back on
13 September 20th. That has never been done before, but
14 this kind of case has never occurred here.

15 Now a lot of places have decided to opt out.
16 I saw some article yesterday that said that 98 percent
17 of the parties decided not to opt out, but various
18 parties have decided to opt out.

19 We have both attempted to educate ourselves
20 as much as possible as far as what is happening in the
21 federal MBL for our purposes, and we are aware of what
22 Judge Polster is doing, and what he is doing is
23 nothing less than incredible, what he has been under
24 so far.

1 I don't think any of us can understand the
2 extent of the work that he has done over the past
3 couple of years and is still doing.

4 But I found it interesting for him to say
5 what he has done, that the model that was in place is
6 not working and it can't work.

7 So he is going back to the drawing board as
8 he goes forward.

9 We know that he is talking about remanding
10 two cases here in this state, Cabell County and
11 Huntington, back to the Southern District, I assume in
12 Huntington.

13 Under certain terms and conditions, I guess
14 the Plaintiffs are going to have to decide whether
15 they are going to agree. I have no idea other than
16 what was in that order.

17 However, a few months ago, I guess two or
18 three months ago, I had a case where Jack Smith -- is
19 Jack here?

20 He is on the Defendants hearing committee. I
21 can't remember. I think he said he was representing
22 some entity from California, but he offered to come in
23 and be involved to assist and cooperate in our state
24 case if it would be helpful to any of us.

1 Since then, Paul Farrell Jr., who is one of
2 the lead counsel in the federal case, has offered the
3 same -- has put forth, rather, the same offer to come
4 in and be involved.

5 So we have talked. If you-all are willing,
6 is it possible to attempt to bring before our
7 resolution panel all the cases, not to do anything to
8 usurp anything that is in federal court, but I can't
9 imagine Judge Polster would object to cases settling
10 out. I am sure he would be very happy if that
11 happened.

12 So is it possible for you-all to get together
13 with your federal counterparts and attempt to resolve
14 all of the cases whether they are at the federal level
15 or here at the state level with the entire Mass
16 Litigation Panel process.

17 I would like you to look at that. I would
18 like you to discuss it. Mr. Farrell says he is
19 willing to. I don't know if Jack Smith is on the
20 steering committee. I don't know who the lead
21 attorney is. I am sure you-all do.

22 Please consider that and let us know if you
23 are willing to do that. If you would like to have a
24 status conference somehow to maybe lay some

1 groundwork, we certainly are pulling to that.

2 Because this is going to be a process and it
3 is not going to happen overnight.

4 We have various issues that we need to
5 discuss. The last time I raised an issue of statute
6 of limitations. We don't know the answer to this.

7 Where is Mr. Linkous today? Is he here as
8 your liaison?

9 MR. FARMER: Mr. Linkous is unavailable
10 today, Your Honor, the one day on his calendar that he
11 could not make it. He apologizes for his absence, but
12 he has delegated some of us to proceed in his absence.

13 JUDGE MOATS: Well, I have one question to
14 the Plaintiffs. Who is speaking for them?

15 MR. FARMER: Pardon me?

16 JUDGE MOATS: Who is going to speak for
17 them?

18 MR. FARMER: Mr. Fitzsimmons was to speak
19 today on the Rule 19 issue.

20 JUDGE MOATS: Well, he doesn't need to speak
21 to that.

22 MR. FARMER: I am happy -- Steve Farmer --
23 as Co-Lead Counsel to --

24 JUDGE MOATS: Mr. Farmer, I have one

1 question.

2 MR. FARMER: Yes, sir.

3 JUDGE MOATS: How far back do the Plaintiffs
4 believe they can go for damages?

5 MR. FARMER: Back to when this whole thing
6 started, Your Honor.

7 JUDGE MOATS: Which is?

8 MR. FARMER: It started in 1996 with Perdue
9 Pharma in the beginning of the false narrative and the
10 fraud about what these drugs could do and why they
11 should be prescribed.

12 JUDGE MOATS: Okay. So we are going to have
13 to have briefed this whole issue of statute of
14 limitations.

15 So you are going to have to show how you can
16 go back to 1996. We all know it is a two-year statute
17 of limitations normally when you knew or reasonably
18 should have known.

19 So that is going to be the first issue we are
20 going to want to look at better.

21 We are going to want to look at how far in
22 the future do you think you can go. We want that
23 briefed, and we would like to know how long do you
24 think it is going to take you to brief it because I am

1 going to give both sides the same.

2 MR. FARMER: We can brief it in 30 days.

3 JUDGE MOATS: Sure. Mr. Meadows?

4 MR. MEADOWS: Good morning, Your Honor.

5 JUDGE MOATS: Good morning. I assume you
6 disagree with Mr. Farmer's position.

7 MR. MEADOWS: Absolutely, Your Honor.

8 JUDGE MOATS: Okay, so how long do you
9 believe that you need to be able to brief that issue
10 on statute of limitations?

11 MR. MEADOWS: I am going to pivot, if you
12 don't mind, Your Honor, and look at my team.

13 JUDGE MOATS: And I understand we have -- I
14 understand we have two holidays basically for two
15 weeks which makes things very difficult. That is why
16 I gave you some more time.

17 MR. MEADOWS: We believe, Your Honor, that
18 if they were granted 30 days to prepare a brief, we
19 could respond within 30 days of their submission.

20 JUDGE MOATS: All right.

21 JUDGE SWOPE: How far back do you think they
22 can go? He said 1996.

23 MR. MEADOWS: Two years, Your Honor.

24 JUDGE SWOPE: Two years, okay. So we know

1 to plan.

2 JUDGE MOATS: That is all we want to know.

3 We are not going to argue your positions.

4 JUDGE SWOPE: No, no. What have you got?

5 MR. EMCH: Just speaking as Lead Counsel for
6 today, Your Honor -- and first of all, let me thank
7 you for the ruling you ruled.

8 You said in the first hearing -- one of the
9 things you said in the first hearing was you don't
10 like to be told things you can't do.

11 I know you and I know the panel, and I know
12 you understand that there are times when lawyers have
13 to say to the Court, "Your Honors, we don't think we
14 can do this."

15 We appreciate your consideration of that
16 position in this situation, and Your Honor, on our
17 motion and our bringing this to the Court and the
18 ruling you made.

19 That is one thing I wanted to say to you.

20 The second thing on this issue I would simply
21 say Lincoln County v. The American Water Company case,
22 which you decided as far as how far back they could go
23 on the statute of limitations.

24 JUDGE MOATS: I recall.

1 MR. EMCH: And the 30 days, I agree with my
2 colleague, Mr. Meadows, and we usually try to be as
3 concise and consistent as we can on the defense side.

4 It is a very large and diverse group. It
5 does not have a single face and it is difficult to
6 coordinate these things, but we will certainly do our
7 best, Your Honor.

8 JUDGE MOATS: Well, you know what their
9 position is. So you-all can start working on that
10 today.

11 MR. EMCH: Yes, sir.

12 MR. FARMER: Your Honor?

13 JUDGE MOATS: Yes, sir.

14 MR. FARMER: May I address the Court very
15 briefly --

16 JUDGE MOATS: Go ahead.

17 MR. FARMER: -- on the same subject?

18 JUDGE MOATS: Go ahead.

19 MR. FARMER: And that is on behalf of West
20 Virginia's hospitals, I would like the Court to
21 understand that on the motions to dismiss we did not
22 ask for extra time to respond to the motion to
23 dismiss, and the reason is simple.

24 That is our clients, the hospitals, don't

1 have extra time. They are in a critical bind as far
2 as things, and the only thing I want to ask is on this
3 issue of statute of limitations, in an effort to move
4 this thing along, could we have 30 days?

5 We are happy to work through two holidays to
6 get these papers within 30 days, but I think it would
7 be fair and just and appropriate given the subject
8 matter that the briefs be submitted at the same time.

9 There is no reason to have another 30 days
10 for response.

11 JUDGE MOATS: I will agree to that. I will
12 give each of you 60 days.

13 MR. FARMER: But we submit them at the same
14 time?

15 JUDGE MOATS: Yes.

16 MR. FARMER: Thank you, Your Honor.

17 JUDGE MOATS: You are welcome.

18 MR. ARCENEUX: Your Honor?

19 JUDGE SWOPE: Let me say something about
20 that. Go ahead.

21 MR. ARCENEUX: Yes, Your Honor. Jay
22 Arceneaux here on behalf of Rite-Aid.

23 I want to emphasize the point that Mr. Emch
24 made, which is we are diverse defendants, and I know

1 in particular Rite-Aid has been involved in litigation
2 for years, and it has a particular statute of
3 limitations argument that it would like to bring to
4 the Court, and I am aware that other pharmacies have
5 similar issues.

6 Would the Court entertain more than one brief
7 per side?

8 If people have a unique statute of limitations
9 argument, would they be entitled to present it at this
10 time?

11 JUDGE MOATS: I guess it depends on how many
12 we are going to have. If we are going to have -- I
13 don't know how many defendants we have.

14 I know a lot of you are -- there are
15 families, what I call families of defendants. We
16 don't want 20 different briefs.

17 You know, we have limited time, too. Both of
18 us have full dockets. We deal with this at nights, on
19 weekends, on holidays, which brings up we just had
20 motions to dismiss the West Virginia Board of
21 Pharmacy.

22 We had that set for hearing today. We worked
23 hours on that one. That was --

24 JUDGE SWOPE: Over Thanksgiving.

1 JUDGE MOATS: Over Thanksgiving. That is
2 why that I said that I worked on Thanksgiving, all
3 Thanksgiving week.

4 Part of that was spending hours on the Board
5 of Pharmacy motion to dismiss that was withdrawn two
6 days ago.

7 Now we can't do that. That is the epitome of
8 frustration for a case that has been pending for a
9 long time, since January.

10 JUDGE SWOPE: Which somebody dismissed that
11 in February.

12 JUDGE MOATS: In February part of it was
13 dismissed, but yet two days before this hearing after
14 we, two judges and our law clerk and my staff and
15 Judge Swope's staff spends hours and hours working,
16 and it is not left.

17 Well, if we are going to do this and you-all
18 say how critical it is, we can't waste our time. We
19 have to be like lasers focused on a topic. That is
20 the only way this is going to work.

21 So I guess, Mr. Arceneaux, you need to
22 contact Mr. Meadows and he needs to submit something
23 once you can tell us how many briefs you actually
24 need.

1 I cannot tell you and give you an answer
2 today.

3 MR. ARCENEUX: Okay, thank you.

4 JUDGE MOATS: Just do it in due course very
5 shortly.

6 MR. ARCENEUX: We will work with Mr.
7 Meadows. Thank you, Your Honor.

8 JUDGE MOATS: Okay, 60 days for both sides.

9 JUDGE SWOPE: I just want to add to that
10 here, too, if you don't mind.

11 JUDGE MOATS: Go ahead.

12 JUDGE SWOPE: Yesterday -- I guess Mr.
13 Linkous isn't here. Yesterday he had filed or maybe
14 the day before as I was finishing my 30 criminal pre-
15 trials and I actually had an abuse and neglect until
16 6:00 Monday night, I get this thing that says, "Here
17 is our agenda," and there are a thousand pages.

18 Who the hell is going to read that? Sit
19 down. Who is going to read that? Okay, the point
20 that I am trying to make here is brevity is the soul
21 of wit. You know, and when you file things that are
22 just on and on -- if you ask for a hundred pages, we
23 probably got 99.

24 When you ask for that, how about bearing in

1 mind who is reading this. We don't have an army of
2 law clerks. We don't have people to -- we don't have
3 that. You are looking at us right here.

4 So if you want to respect the Court, if you
5 appreciate what we do, how about getting to the point,
6 okay? I am not smart. I am not a law review person,
7 okay.

8 Just send it where the calves can get it, and
9 that is what I am going to read.

10 All right, everybody understand that?

11 So I don't need your law review article. I
12 don't need your theme and thesis. I don't need your
13 Phi Beta Kappa Ph.D. essay pieces.

14 I want you to get to the point on what you
15 want. I don't care what they did in New Hampshire. I
16 don't care what they did in Guam or Alaska, okay.

17 I want to know what we need to do here. That
18 is all I am going to say, Judge Moats. I am done for
19 the day.

20 JUDGE MOATS: Now you are.

21 JUDGE SWOPE: But that really upset me when
22 we spent time going over the Board of Pharmacy. I
23 said why are we doing this? They dismissed part of
24 that in February. What are we doing this for?

1 So when I got that thing yesterday after I
2 had listened to God knows how many sexual abuse cases
3 of children, never mind. What is it, Roseanne
4 Roseannadana, Saturday Night Live, never mind.

5 You know, that really upset me. I guess you
6 probably figured that out.

7 Thank you, Judge Moats.

8 JUDGE MOATS: You are welcome.

9 Now let's talk about overall the path this
10 case is going to take. This is not simple, and
11 anybody that says it is is whistling past the
12 graveyard.

13 It is complicated. There are so many parties
14 and there are so many moving parts. We have this
15 issue of case management.

16 The Plaintiffs say, "Let's try every party,
17 every issue next June, and let's have a bifurcated
18 trial with liability and a punitive damage
19 multiplier."

20 There was a seismic shift in West Virginia in
21 2015. Things changed as we know it in the field of
22 litigation.

23 Joint and several liability for the most part
24 was abolished, and a new punitive damage statute was

1 enacted that same year.

2 I was in the asbestos litigation back in
3 2002. Union Carbide was the last defendant standing.
4 I went through a five-week trial.

5 We bifurcated that case, liability, and you
6 had a punitive damage multiplier. What does the
7 statute say now? It doesn't say the plaintiffs can
8 bifurcate.

9 It says that the defendant may request for
10 bifurcation, and if it is granted, the jury first has
11 to decide the amount of the punitive -- or of the
12 compensatory damages before it can be submitted to the
13 jury on the issue of punitive damages.

14 So how do we do that? We can't. The joint
15 and several statute completely ended that.

16 We just wrapped up the Airport litigation,
17 the Airport up the street that collapsed when, back in
18 2000 --

19 JUDGE HOKE: In '15.

20 JUDGE MOATS: In March and all these
21 defendants in the case across the country, but we were
22 under the old law.

23 When it came time to go to trial, it was
24 again, the last defendant standing.

1 That was taken up on a writ of prohibition
2 because the last defendant wanted to be the defendant
3 that was viewed as the most culpable on the verdict
4 form.

5 When the Supreme Court summarily refused that
6 writ, the case settled within 15 minutes, right?

7 JUDGE SWOPE: Yes.

8 JUDGE MOATS: That is not where we are.
9 Every defendant will be on the verdict form.

10 Then we have the new matter that we have
11 never dealt with before. I have never dealt with it
12 before. I haven't had a jury trial yet where it has
13 come up, non-party fault.

14 But yet in this case I think almost everybody
15 has filed a notice of non-party fault, and everyone
16 that I read I keep looking for my name to see if I am
17 in there. So far, I haven't seen my name in there as
18 causing this.

19 It is the old thing that it is everybody's
20 fault; it is nobody's fault. I understand that.

21 I mean, we have all these categories, but it
22 is something that we are going to have to deal with
23 with bated breath.

24 We have never done this before. It is going

1 to take time, and we will deal with it, but we have to
2 decide first issues first.

3 We have 31 new motions to dismiss pending
4 that are going to have to be dealt with before we know
5 who all the players are.

6 JUDGE SWOPE: Can I say something?

7 JUDGE MOATS: Go ahead.

8 JUDGE SWOPE: I just want to say that I sure
9 hope those 31 to 33 motions that you-all filed aren't
10 going to be cookie-cutter regurgitations of the ones
11 that have already been filed and ruled on.

12 I think there is a writ of prohibition on
13 that, isn't there? What is going on with that writ in
14 Charleston?

15 Didn't you-all file a writ about the law of
16 the case?

17 Where is that at?

18 MR. FITZSIMMONS: Your Honor, the writ is
19 pending before the Supreme Court. They have issued a
20 briefing schedule --

21 JUDGE SWOPE: It hasn't been ruled on yet?

22 MR. FITZSIMMONS: No, Your Honor, it has
23 not.

24 JUDGE SWOPE: Okay, that is just part of my

1 point. You know, we just had another mass litigation
2 case where all the briefs we got were cookie-cutter,
3 cookie-cutter.

4 So I really hope, folks, that you have raised
5 novel new things that weren't raised before, and I
6 hope that I am not going to read 31 or 33 or whatever
7 it is of the same thing.

8 JUDGE MOATS: All right, now let's talk
9 about something else.

10 What all of you seem to say is the real issue
11 here, what Judge Polster says seems to be the real
12 issue is a common theme across all the cases in front
13 of him that have been brought in from all over the
14 country, and I understand it has been alleged all over
15 the country.

16 It is our understanding from Judge Polster
17 that these cases are pending in state courts in all
18 but two states, and that is the issue of public
19 nuisance, and we hear that all the time.

20 Now we cannot see or we don't see in any of
21 the complaints exactly what statute you-all are
22 raising that under.

23 Mr. Farmer, can you tell us the statute that
24 you are basing your cause of actions on?

1 MR. FARMER: Your Honor, there is a robust
2 common-law of public nuisance in West Virginia, and by
3 the way, this was briefed in the motions to dismiss
4 that are pending before Your Honors.

5 JUDGE MOATS: Okay, let me stop you there.
6 You-all need to back up. You say you are basing it in
7 on common law?

8 MR. FARMER: Yes, Your Honor.

9 JUDGE MOATS: For a county commission or a
10 city to bring a common law --

11 MR. FARMER: No, the hospitals. I am
12 speaking on behalf of the hospitals.

13 JUDGE SWOPE: Well, who is talking for the
14 counties and the cities?

15 JUDGE MOATS: I understand your hospital
16 issue. You are talking nuisance, and that is a
17 different matter.

18 MR. FARMER: Okay.

19 JUDGE MOATS: I am talking of all the
20 plaintiffs.

21 MR. FARMER: I am hospitals only.

22 JUDGE MOATS: Okay, public nuisance. Who is
23 speaking for counties and cities? Mr. Fitzsimmons?

24 MR. FITZSIMMONS: Good morning, Your Honor,

1 Clayton Fitzsimmons.

2 JUDGE MOATS: Okay, we need you to speak up
3 and if necessary, come up here to the microphone so
4 that we can hear you.

5 What is your statute?

6 MR. FITZSIMMONS: I don't know the numeric
7 number off the top of my head. I can pull that out of
8 the complaint, but I know that the counties, that
9 there is a West Virginia Code, an ordinance, that
10 allows -- the statute allows them to pass an ordinance
11 declaring things to be public nuisances and also to
12 provide them a remedy to abate that.

13 JUDGE MOATS: You are saying that there is a
14 statute that allows a county to pass an ordinance?

15 MR. FITZSIMMONS: Yes, Your Honor.

16 JUDGE MOATS: What is that statute?

17 MR. FITZSIMMONS: I can pull it for you. I
18 don't have it in front of me.

19 JUDGE MOATS: Because I haven't seen it.

20 MR. FITZSIMMONS: It was pled in our brief.

21 JUDGE MOATS: What about the cities?

22 MR. FITZSIMMONS: I don't represent the
23 Cities. I can't speak on the Cities' behalf.

24 JUDGE MOATS: All right. I mean, I have

1 looked at it. The only statute I can see is 16-3-6.

2 It is just nuisance affecting a county.

3 Basically it says county commissions or
4 municipalities all have a right to apply to circuit
5 court for an injunction to restrain or to abate a
6 public nuisance.

7 However, there was a case back in 1982,
8 Berkeley County Commission versus Chavez. Under the
9 syllabus point it says that Code 16-3-6 authorizes
10 public officials, including a county commission, to
11 apply for circuit court injunctions to abate public
12 health nuisances.

13 County Commissions are not authorized to
14 petition for injunctions against any other public
15 nuisance.

16 But you are saying that has been overruled or
17 what?

18 MR. FITZSIMMONS: I am saying that is not
19 the authority under which the counties are proceeding.

20 Again, Your Honor, I apologize. I don't have
21 that off the top of my head.

22 JUDGE MOATS: Okay.

23 MR. FITZSIMMONS: I can get that to you and
24 I can provide you additional information if Your Honor

1 would wish.

2 JUDGE MOATS: Okay.

3 MR. FITZSIMMONS: This issue was briefed and
4 the motion has been dismissed that Judge Hummel had
5 denied.

6 JUDGE SWOPE: Yes, because we are reading
7 things like throwing out the Board of Pharmacy, you
8 know, case in point.

9 MR. FITZSIMMONS: Your Honor, would you like
10 for us to provide a supplemental authority or position
11 on that? We would be happy to do so.

12 JUDGE MOATS: Sure, I would.

13 The same for the cities, what is the
14 authority for the cities, and are you saying that all
15 these counties have enacted ordinances?

16 MR. FITZSIMMONS: The cities -- I believe
17 that the counties that I know we represent have passed
18 ordinances declaring the opioid epidemic a public
19 nuisance.

20 JUDGE MOATS: When, before or after?

21 JUDGE SWOPE: Is it *expo facto* law? It is
22 something that just passed?

23 Do you know when?

24 Ms. Chafin, you represent some. Did your

1 county do anything like that? You represent my
2 county, Mercer County.

3 Did they do that? I don't know. Do you know
4 if Mercer County passed an ordinance? Anybody?

5 MR. FITZSIMMONS: Your Honor, I am lead
6 counsel for the hospitals only. I don't know.

7 JUDGE SWOPE: That is why I asked Ms.
8 Chafin.

9 MR. FITZSIMMONS: I am sorry. I thought you
10 were looking at me.

11 JUDGE SWOPE: Yes, I asked Ms. Chafin.

12 MS. CHAFIN: Your Honor, I am not aware of
13 it.

14 JUDGE MOATS: Because in looking at the
15 complaints, I see nothing. There hasn't been anything
16 alleged by any county or city that they are alleging
17 something under an ordinance.

18 We have a case going clear back -- it has
19 been cited by the Supreme Court several times, Parker
20 versus The City of Fairmont, a 1913 case.

21 It says Counsel may abate only matters a
22 nuisance which is recognized as such per se, which
23 means that in and of itself.

24 So if we are talking opiates, it would have

1 to be oxycodone in and of itself is a nuisance, and I
2 don't think that applies -- or granted as such by a
3 lawful statute or ordinance.

4 So the question would be does a county or
5 city just have -- do they have the authority to just
6 say this is a nuisance and it becomes so?

7 I question whether that is the authority.

8 If somebody puts a pile of radioactive
9 material, that would be a nuisance per se, but does a
10 county commission or authority -- or a county, rather,
11 or a city just have the authority to say, "We declare
12 this is a public nuisance"? That is the question.

13 If that is something you are alleging, that
14 is what you are going to need to look at.

15 As I said, Chapter 16, Article 3, Section 6
16 allows it to be done if that is what you are operating
17 under.

18 We want to know what you are operating under
19 so we can decide which way to go.

20 Injunctions regularly are decided by courts.
21 It is an equitable type remedy ordinarily that
22 wouldn't be entitled to a jury trial. It would be
23 decided by the Court.

24 The Court would determine what the proper

1 abatement is. Judge Polster is dealing with that. He
2 took the position, as I understand it, that there is
3 no absolute right to a jury trial, but he decided to
4 give them one.

5 Well, we haven't decided that. We have a
6 case, Turner versus Camden Clark Memorial Hospital,
7 that says where there are legal issues coupled with
8 injunctive -- a request for injunctive relief, the
9 legal issue, if it is to be tried by a jury, it is to
10 go first.

11 Now we recognize these time frames. The
12 Plaintiffs are saying we want this to go to trial.
13 Our towns and cities are bleeding. Please help us.
14 Get us to trial and stop this public nuisance.

15 JUDGE SWOPE: Our hospitals are suffering.

16 JUDGE MOATS: And our hospitals are
17 suffering.

18 The Defense is saying this is going to take
19 we don't know how long to prepare all the discovery.

20 We are willing to cut through it all. We are
21 willing to have a trial as soon as possible on
22 the issue of public nuisance before the Court.

23 We understand Judge Polster seems to say that
24 probably many plus percent of the liability discovery

1 has already been done. You have got a report and you-
2 all have access to it.

3 Well, you-all are asking for this to be
4 abated. If it is proven that it is a public nuisance,
5 we have that authority.

6 Now right now the question is well, are our
7 hands tied under Turner versus Camden Clark Memorial
8 Hospital?

9 You-all don't have to try it. You say "Hey,
10 we waive that. We want this to be decided."

11 I don't think anybody understands the
12 magnitude and the time periods that we are talking
13 about here that this is going to take.

14 There is no way that we can have a total
15 joint trial of all these issues against all these
16 defendants. I don't know how to do it. None of us
17 do.

18 It is going to overwhelm the court system. I
19 don't know what facility we are going to use. This is
20 the largest courtroom that we would have.

21 I have been told it would be extremely
22 problematic to tie this place up for several months.

23 How long would we be talking about having a
24 trial, six months, eight months, a year or more?

1 Are we going to be able to have jurors commit
2 to that? How do we do this logistically?

3 Judge Polster was able to do things we can't
4 because of this seismic shift in our role in the state
5 with the joint and several liability, that statute.

6 He is severing these. He is allowing the
7 Cabell County and Huntington case to be severed, to
8 just be tried against a particular group of defendants
9 because he is doing that out in Cleveland with
10 pharmacies and he is sending other cases for the same
11 purpose.

12 He is going in a different direction we can't
13 go or at least there is no way that we know because
14 everybody has to be on that verdict form and fault has
15 to be determined for everybody.

16 Maybe you-all can come up with ideas that we
17 don't or we can't. We have to be innovative. We
18 can't do the same things we have always done even
19 though we have done it for a long time.

20 I have been doing this finishing my 23rd year
21 on the bench. I have never done anything like this
22 before. I don't know if any of you have actually
23 worked with this.

24 But we can do that if you-all want to. I

1 can't force you to do anything you don't want to do.
2 We are willing to address the issue of public
3 nuisance.

4 That is what this is all about. It is what
5 it has always been about. It is what Judge Polster
6 says it is all about everywhere.

7 JUDGE SWOPE: It is what the Oklahoma court
8 said it was all about. They tried it for what, 33
9 days out there, Judge?

10 JUDGE MOATS: Thirty-three days. Many of
11 the same defendants who are in this case were
12 involved. That case didn't actually get tried. I
13 understand J&J was the last one standing until the
14 time it went to trial.

15 But that is where we are. You need to tell
16 us if you are willing to do that or not. We want to
17 know and we can focus on that.

18 When we open up the discovery, we don't need
19 to have an all-issues trial with public nuisance right
20 off the bat.

21 We can decide, number one, whether it is
22 public nuisance as the discovery goes along, how to
23 complete a public nuisance if it is so found.

24 So it is not critical to have all the

1 discovery complete. We can do it in phases.

2 I told you before we were going to give you
3 time for both sides to respond to case management.
4 The Plaintiffs said we can do everything next June.

5 The Defendants say that is impossible. They
6 still have to cite the law why it is not possible.

7 I don't know how we are going to do this.
8 Mr. Farmer has 26 hospitals.

9 How are we going to do this with all those
10 hospitals and they are totally separate parties?
11 Where would we put everybody?

12 Now we have 68 plaintiffs.

13 We need your assistance. It can't be, "Here,
14 Judge, you decide this. You figure it out."

15 We are not smart enough, at least I am not.
16 Judge Swope is much smarter than I am.

17 JUDGE SWOPE: I don't know about that.

18 JUDGE MOATS: I look at him and say, "Here,
19 give me a game plan. I need help."

20 We need your help. We need you to work
21 together. The best case scenario, resolve these
22 cases. That is the best case scenario. Resolve these
23 cases and the federal cases. You come up with a plan
24 where an entire state is taken off of the table.

1 That would be the best case scenario.

2 I don't know how it plays in the federal
3 negotiating class. I have no idea. There have to be
4 things happening behind the scenes that we don't know
5 about, we will never know about.

6 Does that somehow tie our resolution judge's
7 hands as far as what can be done or when it can be
8 done here? I don't know. Maybe some of you do.

9 We sort of feel like we are somewhat in the
10 dark. We have learned a lot in the past two and a
11 half months.

12 Judge Polster tells other judges he doesn't
13 want them to go through what he has gone through over
14 the past two years.

15 We would like to have all his knowledge today
16 that he has worked so hard over two years to obtain
17 but we don't.

18 We have the benefit of all of his orders and
19 some of the transcripts, which have been extremely
20 helpful to us, and we will learn as we go along.

21 Right now it seems like chaos as do a lot of
22 these cases when we start. Over time we can narrow
23 them down and bring order to the cases and we will
24 here but it is going to take hard work and it is going

1 to take tremendous cooperation.

2 It cannot be and it won't work if every time
3 there is something said there has to be an argument
4 and a fight about it or a writ of prohibition. It
5 just can't work.

6 Next week, next Thursday Judge Alsop and I
7 and going to be back up here and hope we are going to
8 bring to resolution the tobacco litigation in West
9 Virginia that has been pending since 1998,
10 approximately 1,300 plaintiffs, all the major tobacco
11 companies, 22 years in litigation, writs, appeals,
12 trials, attempts to get jurors.

13 Next week hopefully, hopefully we can finally
14 deal with that case.

15 This case has the same potential. This case
16 has the potential to last that long. It does. You-
17 all may disagree, but it does unless you decide not
18 to.

19 So that is what we have to say today. We
20 don't have a lot of answers for you. I wish we did,
21 but this is not something that is going to happen
22 overnight.

23 We are no more prepared now to enter a case
24 management order than we were two and a half months

1 ago until we get these issues decided preliminarily.

2 So you have your briefing schedule for the
3 statute of limitations. We want you to rack them up.
4 We want to know. If you are alleging that there are
5 individual nuisance statutes that counties enacted,
6 and the statute by the way is supplemental (3)(k)(8)
7 probably that you are referring to.

8 Then there is a statute dealing with
9 municipalities and that is 8-12-5, Paragraph 23.

10 But again, it is going to have to be
11 something per se. It can't be just because the county
12 commission or a city says this is a public nuisance.
13 They have no authority to declare something a public
14 nuisance that I am aware of.

15 I think that you are going to find out the
16 Supreme County cases say likewise unless it is
17 pursuant.

18 So I want you to look at that and I want you
19 to seriously consider and discuss seriously among
20 yourselves.

21 I want to know about this proposal that we
22 have to try the issue before the Court on public
23 nuisance, Phase I of the case, as you-all go about
24 your discovery for abatement issues, costs, and so

1 forth, and we will open it up for damages on all these
2 issues.

3 Then we will finish the matter when that is
4 complete and set the rest of it aside for the time
5 being or you can rely on Turner versus Camden Clark
6 and say, no, I am not going to do it, that this is
7 going to be a war to the bitter end.

8 That is how we are going to go about our
9 business. The choice will be yours.

10 JUDGE SWOPE: The whole thing, the point is
11 that, you know everybody keeps saying how it is
12 rattling us and you raise that point and we have all
13 said it.

14 We are offering right now a chance to stop
15 the bleeding. We are offering a chance to stop the
16 bleeding and then we can pick up the pieces as to
17 that.

18 But you know, Judge Moats, I think you hit
19 the nail on the head.

20 JUDGE MOATS: Judge Tabit, anything from
21 your standpoint?

22 JUDGE TABIT: Just from our standpoint,
23 obviously on the decision made as to how we are going
24 to be moving forward, our panel certainly looks

1 forward to working with that and moving toward some
2 type of an amicable resolution to the matters.

3 JUDGE MOATS: Okay, are there any issues or
4 anything else?

5 I am not going to hear any arguments or
6 anything, but is there anything procedurally that we
7 need to discuss or bring up here today?

8 Mr. Meadows?

9 MR. MEADOWS: Your Honor, if I could just
10 add one thing.

11 JUDGE MOATS: Go ahead.

12 MR. MEADOWS: Just for the good of the
13 order, the defendants work together on a lot of the
14 issues and we have the ability to communicate among
15 ourselves and handle almost any issue that this panel
16 wishes to raise.

17 It would be helpful in advance of future
18 status conferences if we could potentially work with
19 Plaintiffs' Liaison Counsel and Ms. Fields to agree on
20 the agenda.

21 For instance, today when you raised the
22 statute of limitations, there are many issues coming
23 from the Defendants which are related to that. I have
24 my own client I am representing here.

1 Today when you asked the question off the
2 cuff, I pivoted to look at someone who doesn't
3 represent my client because I knew personally that he
4 had a vested stake in that.

5 JUDGE MOATS: Sure.

6 MR. MEADOWS: And certainly all these
7 defendants may have something to say and I hate to
8 commit on behalf of the Defendants when we didn't even
9 know it was coming.

10 JUDGE MOATS: I understand, but up to this
11 point it has been hard to really come up with a set
12 agenda because it has been such a moving target as the
13 days goes by leading up to a conference.

14 MR. MEADOWS: I appreciate that, Your Honor.
15 Before they drag me out of here and tar and feather me
16 afterwards, I want to make sure I have at least said
17 that so that we can perhaps work on agendas in the
18 future just with Ms. Fields if that is appropriate.

19 JUDGE MOATS: All right, another thing,
20 communicating with our Mass Litigation manager, Ms.
21 Fields, if you communicate with her it cannot be one-
22 sided and unfair. If one side, one attorney
23 communicates with her, let them advise the other
24 party.

1 We all know you can't do that and it puts her
2 in a very difficult position, and it is not proper
3 just to communicate to her, "Hey, what do you think
4 the judges would do with this." That is not her
5 function at all.

6 Anyway, anything else? Yes, sir. State your
7 name, please.

8 MR. SHKOLNIK: Your Honor, Hunter Shkolnik
9 of Napoli Shkolnik. I am one of the appointed co-
10 leads. Thank you for your time today.

11 One issue you brought up, I think it would be
12 very helpful to the panel, there are other litigations
13 consolidated on issues going on across the country.

14 In fact, in New York we have a trial date
15 scheduled for March 20th. Public nuisance will be the
16 only trial.

17 What I am suggesting in the future as part of
18 our agenda that we also provide you with an update of
19 any other consolidated litigations that would help the
20 Panel to know what else is going on other than Judge
21 Polster's orders that have been issued to help
22 streamline that case.

23 In fact, some of my colleagues here, we are
24 all going to be there Monday hashing out issues

1 regarding that trial.

2 I know you are trying to get your arms around
3 a mile here, and Judge Garguilo in New York is
4 wrestling those same issues and I just want to suggest
5 that we could provide updates.

6 JUDGE SWOPE: Do you have the same statute
7 up there that we do on the verdict form. I don't
8 think you do, do you? About 25 states have that. I
9 know because I looked at in the Airport case.

10 MR. SHKOLNIK: We don't have -- we don't
11 have to have everybody on, but there is a portion of
12 liabilities -

13 JUDGE SWOPE: But you don't have to put non-
14 parties, people who have settled, everybody else that
15 you can possibly throw into the mix on your verdict
16 form, right?

17 MR. SHKOLNIK: No, we do not.

18 JUDGE SWOPE: Okay.

19 JUDGE MOATS: Our position to what you say
20 is we would absolutely love to have that. For us it
21 is almost impossible to find. We don't have any way
22 of digging all that out. So it would be very helpful
23 to know that.

24 Along the same lines, back in 2007 and '08 we

1 had -- you may be seated.

2 JUDGE MOATS: We had a case that was called
3 the Digitek Park litigation. I don't know if any of
4 you were involved in any of that litigation, but there
5 was an MBL in that.

6 That went to Judge Joseph Goodwin here in the
7 Southern District of West Virginia, and our Mass
8 Litigation Panel had the West Virginia cases, and we
9 coordinated that with Judge Goodwin.

10 He really was great in leading that. He
11 coordinated, reached out to all the other state court
12 judges, and it was not nearly as massive as this, but
13 we even had a joint conference in Philadelphia with
14 the state court judges and Judge Goodwin.

15 It was incredibly helpful to know what was
16 happening across the country, not just here in West
17 Virginia but for the other judges as well, and we
18 worked closely together as that case was resolved.

19 So it would be helpful for us to know what is
20 happening across the country. We can find out in the
21 federal litigation, but we just don't have anyway to
22 know what goes on in other states.

23 So we would appreciate both sides working
24 with us to keep us informed. It doesn't have to be

1 just when we come to these hearings.

2 You can do that periodically, and I would
3 like to know that because I even searched on news
4 sites to see if there was any news about that in other
5 states.

6 MR. SHKOLNIK: Your Honors, we can work with
7 Defense Counsel and come up with not a one-sided but
8 we will come up with what should be jointly submitted.

9 JUDGE MOATS: Sure, and maybe you can submit
10 that to us periodically, okay.

11 MR. SHKOLNIK: We would be happy to do that.
12 Thank you.

13 Is that agreeable, Mr. Meadows?

14 MR. MEADOWS: Yes, Your Honor. I am in the
15 pit of this large room, but I am sure we can come up
16 with an agreement.

17 JUDGE MOATS: I appreciate that.

18 MR. SHKOLNIK: Thank you.

19 JUDGE MOATS: Another issue that I wanted to
20 discuss which Judge Hoke reminded me of, one thing at
21 the federal level, I have been able to see Judge
22 Polster has appointed special masters under Rule 53 of
23 the Rules of Federal Civil Procedures.

24 That is fairly in-depth rule and it looks

1 like those special masters are kept very busy and they
2 do a lot of work.

3 He also has, I assume, some of the federal
4 magistrate judges overseeing some of the discovery
5 issues.

6 Our Rule 53 -- has anybody ever looked at
7 that? Take a look at that. It is a rule that says
8 absolutely nothing.

9 JUDGE SWOPE: It basically says we are going
10 to do what we have always done.

11 JUDGE MOATS: It says that we can have
12 commissioners and they can do what has always been
13 done as far as chancellors, commissioners have been
14 done. Well, what is that? It doesn't say.

15 So what does that rule say? I don't have any
16 idea. You have the rule there, Mr. --

17 JUDGE SWOPE: I have got it here, too.

18 JUDGE MOATS: Can you explain that rule?

19 MR. MEADOWS: I wouldn't dare to do that,
20 Your Honor.

21 JUDGE MOATS: Okay. I have read it. It
22 doesn't say much of anything. Here it is. Rule 53
23 states that Commissioners and Chancellors shall be
24 known as Commissioners.

1 "The practice respecting the appointment of
2 such commissioners and references to them respecting
3 their powers and duties and powers and duties of
4 courts to hold a hearing upon their reports shall be
5 in accordance with the practice heretofore followed in
6 West Virginia."

7 What does that mean? I have no idea. So
8 anyway, what we have done in the past is to appoint a
9 discovery commissioner when issues come up, and we
10 have been very successful and we have had
11 commissioners do a great job.

12 That brings us to you, Mr. Arceneaux. We are
13 extremely disappointed in your behavior in this case.
14 Mr. Arceneaux has been one of our discovery
15 commissioners. So when I saw him in the first case, I
16 think he did this to us on purpose.

17 JUDGE SWOPE: This is how you escape it.

18 JUDGE MOATS: This is how he escaped our
19 clutches. Jay has done a wonderful job as a discovery
20 commissioner, sometimes on such short notice we were
21 almost embarrassed to ask him, but he would drop what
22 he was doing and have hearings and issue responses.

23 He was always thoughtful and both sides
24 appreciated him, and that is what we are looking for.

1 So what I am going to ask both sides here is
2 to submit names of persons, lawyers, here in this
3 state that you believe would be acceptable, hopefully
4 that you can get together and agree on.

5 Now this is going to be difficult in this
6 case because of the wide breadth of people involved,
7 and I am going to ask that we use the federal Rule 53
8 as a model because number one, it is an issue of
9 disqualification, and Rule 53 of the federal rules
10 specifically addresses who would be disqualified.

11 It is almost going to be as if that person,
12 which they are, is going to be in a judicial capacity
13 and would be disqualified in the same category as I or
14 Judge Swope or any other judge here.

15 So it is going to have to be somebody who is
16 not involved in the litigation, somebody who is not
17 involved before us in other cases, somebody who is not
18 involved with you in an adversarial role in cases
19 because that would not be proper either.

20 So it really narrows the scope of available
21 people.

22 There would be a category of possible people
23 retired or senior status judges that could be brought.
24 A lot of them don't have support staff. So we would

1 have to be looking at how to get them support staff to
2 do this as well.

3 I have no idea the extent of the discovery
4 disputes that have taken place in federal court. I
5 can only assume they have been numerous based upon
6 what I have seen and read.

7 We don't have the capacity to do that. We
8 don't have the time, and it is going to have to be
9 done with a commissioner.

10 So we are going to ask that you please work
11 together and come up with a proposed list for us to
12 look at.

13 All right, is that agreeable? Thank you all.

14 Anything else? Yes, ma'am. State your name.

15 MS. KEARSE: Judge, Ann Kearse with Motley
16 Rice. I have the eight other cases that are pending
17 in Marshall County.

18 I submitted a proposed order for transfer to
19 the case, a joint order. I submitted that yesterday.
20 So it may not have had time, but it is pending, a
21 proposed order of transfer to be in, if Your Honor
22 judges me to be qualified as --

23 JUDGE MOATS: You were there, weren't you?

24 MS. KEARSE: I was there, Your Honor, and in

1 some of the other cases.

2 JUDGE MOATS: Just as an aside, I was
3 telling the panel this morning -- you can be seated
4 unless you have something else.

5 MS. KEARSE: My co-lead, my partner, Joe
6 Rice, is the lead in the MBL and would be happy to
7 provide information about the MBL from the other state
8 proceedings, Your Honor.

9 JUDGE MOATS: Okay, again, that is what I
10 want you-all to do to see if we can do this and is it
11 possible to attempt to mediate all that stuff, and so
12 you will have an insight there and reason perhaps for
13 them to be involved.

14 So as soon as that proposed order comes
15 through, if the Defendants are agreeable, just sign it
16 and submit it.

17 So we have come a long -- as I started to
18 say, my very first case on this Mass Litigation Panel
19 was the asbestos litigation.

20 I had never done anything like this before.
21 My first hearing was in Judge Haden's courtroom. Were
22 you there for that one?

23 I remember I walked in and every seat in the
24 room was taken, the jury box, counsel table, attorneys

1 lined up around the wall and out in the hall.

2 I stood up and I thought what have I gotten
3 myself into? So it was incredible. Everybody was
4 very cooperative.

5 When I asked everybody, I said, "We are going
6 to have an expedited trial because we already have the
7 first liability trial set in September."

8 I was dealing with the deliberate and intent
9 part of all of those cases. I said, "Everybody,
10 please pull out your calendars. I want to pick a date
11 that is convenient for everybody. What is convenient
12 for me is December 1. We will try it the whole month
13 of December. Any objections?" Dead silence.

14 I have two lawyers in front of me now for a
15 car wreck case and I can't get them to agree on a date
16 over the next nine months.

17 So I want to say these are a different breed
18 of cases, and it takes incredible cooperation,
19 diligence, and a willingness to cooperate and work
20 together. That is the only way this can be done, and
21 that is what we are asking for.

22 We will work hard because we have been
23 working hard. We just ask you to not do things unless
24 they are absolutely necessary and don't raise issues

1 just for the sake of raising them.

2 Don't be afraid to give ground. Take a close
3 look at your defendants. Judge Polster told the
4 plaintiffs, the ones you are not serious about, get
5 rid of them.

6 This case can either be done or it can
7 collapse under its own weight. Right now it is
8 extremely heavy, extremely, and unless some of the
9 issues and parties are narrowed down, it is going to
10 remain that way.

11 It is my understanding the last time you told
12 me that you were going to cast aside or at least shut
13 off all the individuals.

14 Has that been done? I think I have signed
15 some orders to that effect.

16 MR. FITZSIMMONS: Yes, Your Honor.

17 JUDGE MOATS: All of them have been?

18 MR. FITZSIMMONS: Yes, they have been
19 dismissed or settled.

20 JUDGE MOATS: All right, thank you. Okay,
21 with that, anything else?

22 I appreciate all of you coming here today. I
23 wish you a joyous upcoming holiday season, and as soon
24 as we get these briefs sent in, we will reset the next

1 hearing. We will reset something that was necessary
2 in the meantime.

3 Thank all of you so much.

4 (WHEREUPON, at 11:08 a.m., the
5 hearing was concluded.)
6

REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, TO-WIT:

I, Donna Miller-Mairs, Certified Court Reporter, hereby certify that the foregoing is, to the best of my skill and ability, a true and correct transcript of the evidence introduced and proceedings had in the aforementioned case on the 6th day of December, 2019, as reported by me by Stenomask procedure.

I hereby further certify that the transcript within meets the requirements of the Code of the State of West Virginia, 51-7-4, and all rules pertaining thereto as promulgated by the Supreme Court of Appeals.

Given under my hand this 27th day of December, 2019.

My commission expires November 22, 2022.

DONNA MILLER-MAIRS
Certified Court Reporter

Donna Miller-Mairs, CCR